INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	3
Reasons for granting the writ	10
Conclusion	19

Appendix A—Opinion of the United States District Court for the District of Oregon, issued April 14, 1960 ..... 1a

Appendix B—Opinion of the United States Court of Appeals for the Ninth Circuit, entered December 19, 1960 ..... 22b

Appendix C—Judgment of the United States Court of Appeals for the Ninth Circuit, entered December 19, 1960 ..... 36c

CITATIONS

CASES:

Aleo Mfg. Co., 15 L.A. 715 (Samuel H. Jaffee, Arbitrator, 1950) 13, 14

American Telephone & Telegraph Co., 6 L.A. 31, (Saul Wallen, Arbitrator, 1947) 13

Armour & Co., 11 L.A. 600 (Harry M. Gilden, Arbitrator, 1948) 14

Cumberland Undergarment Co., 5 L.A. 766 (Copelof, Arbitrator, 1946) 14

Encinal Terminals, 4 L.R.R.M. 1117 (Wayne L. Morse, Arbitrator, 1939) 13

Independent Petroleum Workers v. Esso Standard Oil Co., 3rd Cir., 1956, 235 F. 2d 401 17

Lane v. Endicott Johnson Corp., 11 L.A. 253, 299 N.Y. 725, 75 N.Y.S. 2d 171, 87 N.E. 2d 450 (1948) 14

Page

Lodge No. 12, Machinists v. Cameron Iron Works, Inc., 5th Cir., 1958, 257 F. 2d 467, certiorari denied, 358 U.S. 880 15
Mary Leila Cotton Mills, Inc., 26 L.A. 541 (Gerald A. Barrett, Arbitrator, 1956) 13
Serrick Corp., 32 L.A. 994 (Pearce Davis, Arbitrator, 1959) 14
Shipscaler's Case, quoted at length in 8 L.A. 273 (Van C. Griffin, Arbitrator, 1959) 13
Textile Workers v. Aristo Mills Co., 4th Cir., 1951, 193 F. 2d 529 15
Trans World Airlines, 24 L.A. 95 (Harold M. Gilden, Arbitrator, 1955) 13
United Steelworkers v. American Mfg. Co., 363 U.S. 564 ..... 10, 11
United Steelworkers v. Enterprise Corp., 363 U.S. 593 ..... 10, 11
United Steelworkers v. New Park Mining Co., 10th Cir., 1959, 273 F. 2d 352 ..... 14, 17
United Steelworkers v. Warrior & Gulf Co., 363 U.S. 547 ..... 10, 11
Waterfront Employers Assn., 8 L.A. 273 (Clark Kerr, Arbitrator, 1947) 13
Wilson & Co., 34 L.A. 125 (United States District Judge Sam Perry, Neutral Arbitrator, 1960) 14

STATUTES

Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185

Section 301 (a) 2

National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*

Section 8 (a) (1) 3

Section 8 (a) (3) 3

Section 8 (a) (5) 3

CONGRESSIONAL MATERIAL

House Conference Report No. 510, on H.R. 3020, 80th Cong., 1st Sess., pp. 41-42, 1 Leg. His. L.M.R.A. pp. 545-546 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17,
Petitioner,

v.

OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Portland Web Pressmen's Union, Local No. 17, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on December 19, 1960.

OPINIONS BELOW

The opinion of the court below (Appendix B, *infra*, pp. 22b-34b) is not yet officially reported. It is unofficially reported in 47 L.R.R.M. 2432. The opinion

of the district court (Appendix A, *infra*, pp. 1a-2a) is reported in 188 F. Supp. 859.

JURISDICTION

The judgment of the court of appeals (Appendix C, *infra*, p. 36c) was entered on December 19, 1960. The petition for rehearing duly filed by petitioner was denied on January 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. In an action under Section 301 (a) of the Labor Management Relations Act to compel arbitration pursuant to a collective bargaining agreement which provides for arbitration of any grievance involving the construction or violation of the collective bargaining agreement, may the court properly deny arbitration on the ground that the case presents no justiciable issue because the court has determined that the grievance sought to be arbitrated is not one for which an arbitrator could afford specific relief of a substantial character.

2. Whether the availability of a remedy under the National Labor Relations Act for the conduct which constitutes a breach of contract, deprives the court of jurisdiction to compel arbitration of the breach of contract.

STATUTES INVOLVED

Section 301 (a) of the Labor Management Relations Act (61 Stat. 156, 29 U.S.C. 185) provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing

employees in an industry affecting commerce as defined in this act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are as follows:

"SEC. 8 (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

* * *

"(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9 (a)."

STATEMENT

On March 5, 1958, the Portland Web Pressmen's Union, Local No. 17, hereinafter sometimes called the Pressmen, entered into a collective bargaining contract with the Oregonian Publishing Company and the Journal Publishing Company, hereinafter sometimes called the Publishers (Tr. 14-35).[1] This con-

[1] The references "(Tr.)" are to the Transcript of Record printed in the court below. Ten copies thereof have been filed with the Clerk of this Court.

tract by its terms was effective January 1, 1958, and was to continue until December 31, 1959, and from year to year thereafter unless within 90 days prior to December 31st in any year subsequent to 1958, one of the parties gave notice of desired changes therein (Tr. 5, 14-35). The contract provided a Joint Standing Committee to which the parties agreed to refer "all questions which may arise concerning the construction to be placed upon any clause of this contract or alleged violation thereof" (Tr. 16-17). The contract also provided (Tr. 17):

> "The standing committee shall have jurisdiction to determine whether the disputed issue is covered by the terms of this contract."

In the event the Joint Standing Committee could not agree, there was provision for decision by a local board of arbitration (Tr. 17-18).

On or about October 28, 1959, each of the Publishers gave written notice to the Pressmen of its desire to negotiate a new agreement to supplant the theretofore existing contract between the parties and proposed to the Pressmen in writing certain specific changes which each of them desired to have incorporated in such new agreement (Tr. 6).

On or about November 10, 1959, members of Stereotypers Local Union No. 48, hereinafter sometimes called Stereotypers, commenced a strike against the Publishers and established picket lines at the plants of the Publishers, which picket lines have been continuously maintained at all times since then up to the time of the filing of the complaint in this case in the court below (Tr. 6). This strike was called by the Stereotypers to secure improved hours, wages and

working conditions to supplant those provided in an expired contract between the Stereotypers and the Publishers (Tr. 6-7).

The Pressmen on and at all times after November 10, 1959 and until January 2, 1960, advised its members of its and their obligations not to strike and not to engage in work stoppages while the contract between the Pressmen and the Publishers remained in effect (Tr. 7). The individual members of the Pressmen who were employed in the pressrooms of the Publishers obeyed this advice and did not strike or engage in any work stoppage, but as individuals each one declined to cross the picket lines maintained by the Stereotypers and declined to report for or to perform his work in the production of the Publisher's newspaper behind the picket line (Tr. 7). This failure of the individual members of the Pressman to cross the Stereotypers' picket lines or to report for work behind those picket lines continued from about November 10, 1959 until January 2, 1960 (Tr. 7).

On November 18, 1959, the Pressmen's negotiating committee met with executives of the Publishers and discussed the proposals of the respective parties for the new agreement between the Pressmen and the Publishers (Tr. 7-8). No conclusions were reached but the meeting terminated with an agreeable understanding that further meetings would be held upon call of the Publishers (Tr. 8).

The Pressmen made various unsuccessful informal efforts by telephone to arrange further meetings to negotiate a new agreement and on December 27, 1959, addressed a formal written request to the Publishers for a series of immediate meetings, calling attention to the fact that the existing agreement between the

Pressmen and the Publishers would expire on December 31, 1959 (Tr. 8, 36-37).

A reply to this request was received late in the afternoon of December 28, 1959, in which the Publishers stated that the Pressmen and its members on November 10, 1959, and thereafter had refused to honor the no-strike pledge of the then existing agreement between the Pressmen and the Publishers, that the pressmen who had failed to appear for work subsequent to November 10, 1959, "are no longer employees" and that the Publishers were ready to meet to negotiate a new contract at any time that the Pressmen could establish that it represented "a majority of our employees in an appropriate unit" (Tr. 8, 38-39). At no time prior to the receipt of this letter on December 28, 1959, had the Publishers ever in any manner challenged the employee status of the members of the Pressmen who had been employed in the pressrooms of the Publishers or the status of the Pressmen as exclusive bargaining representative of the pressroom employees of the Publishers (Tr. 8-9). Nor had the Publishers at any time from November 10, 1959, until the filing of the complaint in this case in the court below, initiated or participated in any of the procedures provided in the contract for the adjustment and settlement of contract disputes arising between the parties to the contract (Tr. 9).

The Pressmen, on December 28, 1959, immediately after receiving the aforementioned letter from the Publishers, sent the Publishers a Western Union night letter which was delivered not later than the morning of December 28, 1959, in which the Pressmen expressed its disagreement with the Publishers' position that the pressroom employees are no longer employees of the

Publishers, stated the Pressmen's view that if the Publishers had a grievance they should have resorted to the settlement procedures provided in the agreement, and itself referred to the Joint Standing Committee the differences between the parties arising out of the Publishers' letter of December 28, 1959 (Tr. 40). The Pressmen in its letter of December 28, 1959, requested a meeting of the Joint Standing Committee "on these emergency issues forthwith," urged that there was no occasion for either the Publishers or the Pressmen to take refuge in the "within five days" provision to delay such a meeting of the Joint Standing Committee beyond sometime on December 29, 1959 and stated that "our Standing Committee members stand ready to meet with the Publisher members of the same committee upon the shortest telephone notice" (Tr. 40-41).

The Publishers have never responded in any manner to this Western Union night letter (Tr. 9-10).

On January 4, 1960, the Pressman appointed members of the Joint Standing Committee, sent a letter to the Publisher appointees of the same committee asking to meet with them without further delay to deal with the differences referred to the Committee by the Pressmen's Western Union night letter of December 28, 1959 (Tr. 10, 41-43). The Pressmen's position with respect to the settling of these differences under the Joint Standing Committee procedures was stated in the letter of January 4, 1960, as follows (Tr. 43):

> "Those differences having arisen prior to January 1, 1960, and having been referred to the Joint Standing Committee prior to that date, the Union position is that the entire adjustment of differ-

ences procedures which are provided for in the basic agreement remain available and applicable to the parties, and obligatory upon them, until the differences have reached final determination through utilization and, if necessary, exhaustion of those procedures."

On January 11, 1960, the Publishers replied to the letter of January 4, 1960, stating that they did not agree with the positions taken by the Pressmen and therefore no useful purpose would be served by complying with the request (Tr. 10-11, 44).

On January 15, 1960, the Pressmen filed its complaint in the United States District Court for the District of Oregon, invoking the court's jurisdiction under Section 301 of the Labor Management Relations Act of 1947 (29 U.S.C. 185) and seeking an injunction requiring the Publishers to follow the grievance procedures of the contract, including the arbitration provisions, with respect to the differences between the parties arising from the declination of the pressroom employees as individuals to cross the picket line of the Stereotypers (Tr. 3-14). The Publishers filed a motion to dismiss on the grounds that the court lacked jurisdiction over the subject matter of the action and that the complaint failed to state a claim upon which relief could be granted (Tr. 45).

The district court on April 14, 1960 handed down an opinion (Tr. 46-67) and on April 19, 1960 entered its order (Tr. 67-68) dismissing the complaint on the grounds urged in the motion to dismiss.

In its opinion the district court recognized that Section 301 of the Labor Management Relations Act "confers jurisdiction on the Federal courts to render a declaratory judgment as to an existing contract"

(Tr. 54-55) and "extends jurisdiction in a proper case to actions for specific performance of an arbitration agreement" (Tr. 55). The district court, however, held that it had no jurisdiction over the subject matter of the suit because the rights of the Pressmen, "if any, which might exist would arise by reason of the National Labor Relations Act and exclusive jurisdiction would be with the National Labor Relations Board" (Tr. 66).

The district court also held that the complaint failed to state a claim upon which relief could be granted because the complaint did not present facts showing a justiciable question (Tr. 66). The district court ruled that no vested rights had accrued before the contract expired (Tr. 56), that the period of time from the demand for processing of the grievance on December 28, 1959 until the contract expired on December 31, 1959 is so minimal that the doctrine of "*de minimis*" should be applied (Tr. 56) and that the Pressmen had in any event lost its right to compel arbitration because the failure of its members to cross the Stereotypers' picket line violated the no-strike clause in the contract (Tr. 56, 60-66). The district court held that its ruling that the Pressmen lost its right to arbitrate, rendered "moot" the legal question "of whether the arbitrator, under the language of the instant case should determine whether the issues in question were to be arbitrated" (Tr. 63).

On appeal to the United States Court of Appeals for the Ninth Circuit, the judgment of the district court was affirmed (pp. 22b-35b, *infra*). The court of appeals held that no justiciable question was presented because the arbitrator would not have been able to afford specific relief (pp. 28b-30b, *infra*) and that

any rights which the Pressmen might claim would be within the exclusive jurisdiction of the National Labor Relations Board (pp. 30b-33b, *infra*). The court of appeals expressly declined to pass upon the contention of the Publishers "that the violation of the no-strike agreement by members of the Pressmen deprived the union of the right to invoke the arbitration clause of the contract" (pp. 34b-35b, *infra*).

REASONS FOR GRANTING THE WRIT

1. The court below failed to follow the principles announced by this Court in the cases of *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 569; *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 547, 578; and *United Steelworkers* v. *Enterprise Corp.*, 363 U.S. 593, 596. In these cases this Court held that courts are not entitled to refuse to order arbitration because they regard the grievance in dispute as a "frivolous, patently baseless one" (363 U.S. at p. 566). In the *American Mfg. Co.* case this Court stated (363 U.S. at p. 568):

> "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. The processing of even frivolous claims may have therapeutic values of which those who are not a part of the plant environment may be quite unaware."

That the court below could not envision any specific remedy which an arbitrator could properly award in the instant grievance, should no more serve as the

basis for a refusal to enforce arbitration than the failure of a court to find a claim meritorious or not frivolous. There can be no difference in principle between courts denying arbitration because they see no possible remedy and denying arbitration because they see no possible merit. To refuse to compel arbitration for either reason is equally an improper refusal of the courts to defer to the arbitration process without introducing court made law where the parties had agreed to accept arbitrator made law. If a court can pass on the merits of the claim or its remediable nature as a condition precedent to enforcing arbitration, the parties are deprived of their contractual right to have this issue determined by the stipulated arbitration process rather than by the judicial process. It is the teaching of the three decisions of this Court in *American Mfg. Co.*, *Warrior & Gulf Co.*, and *Enterprise Corp.*, that courts must defer to the arbitration process without screening cases to see if they meet legal standards of merit before ordering arbitration. If the grievance is one that the parties have agreed to arbitrate, the courts must order arbitration.

Here the Publishers' contention made on December 28, 1959, that sometime between November 10, 1959, and December 28, 1959, the Pressmen had violated the no-strike clause and all the Pressmen's members ceased to be employees (Tr. 38), certainly presented a grievance within the language of the grievance clause of the then existing collective bargaining agreement, namely "all questions which may arise concerning the construction to be placed upon any clause of this contract or alleged violation thereof" (Tr. 17).

Since the grievance was one which the parties had contracted to refer to arbitration, the Pressmen was

entitled to specific performance of the agreement to arbitrate without any requirement on its part that it establish that there was specific relief which the arbitrator could award. The court below placed on the Pressmen the burden of satisfying the court that the arbitrator could award specific relief for this grievance. We believe that under the foregoing decisions of this Court this was an improper burden. Pressmen had secured the binding contractual obligation of the Publishers to let an arbitrator establish a remedy for grievances. The Pressmen was entitled to have the courts below enforce obedience to that contractual obligation without indulging in speculations as to the wholly technical and meaningless character of the only relief the courts can envision the arbitrator as awarding.

The Publishers must be held to their agreement to arbitrate. The Publishers can then argue to the arbitrator the proper limits of the award. The Pressmen is entitled to have the arbitrator decide whether any substantial remedy is properly to be awarded for its grievances.

The court below in viewing the grievance as one for which no arbitrator could award any specific relief took a judicial approach so at odds with the arbitral approach as to emphasize the correctness of this Court's view that parties who had bargained to have disputes decided by arbitrators were being deprived of what they bargained for if courts first screened grievances by judicial standards before enforcing arbitration. Turning to labor arbitration cases, we find no dearth of authority for the proposition that the arbitrator on the facts stated in the complaint could properly order full reinstatement to his respective job of

each member of the Pressmen. This right to be reinstated became a vested and accrued right in each individual employee when on December 28, 1959, the Publishers announced that none of the Pressmen's members was employed by them.

Labor arbitrators regularly protect employees from discharge for honoring a legitimate picket line. It is held to be an implied term of even a no-strike clause that honoring a picket line is a permissible employee activity which will not be penalized by the employer. For decisions so holding see *Encinal Terminals*, 4 LRRM 1117 (Wayne L. Morse, Arbitrator, 1939); *American Telephone & Telegraph Co.*, 6 L.A. 31, 35-36 (Saul Wallen, Arbitrator, 1947); *Waterfront Employers Assn.*, 8 L.A. 273, 278 (Clark Kerr, Arbitrator, 1947), reversed in part on other grounds 9 L.A. 5; *Shipscaler's Case*, quoted at length in 8 L.A. 273, 275-276 (Van C. Griffin, Arbitrator 1939).

Moreover, even where employees engage in an unauthorized or illegal strike, they do not automatically cease to be employees. *Mary Leila Cotton Mills, Inc.*, 26 L.A. 541 (Gerald A. Barrett, Arbitrator, 1956); *Alco Mfg. Co.*, 15 L.A. 715, 725 (Samuel H. Jaffee, Arbitrator, 1950); *Trans World Airlines*, 24 L.A. 95, 100 (Harold M. Gilden, Arbitrator, 1955). Where, as in the instant case (Tr. 30), the contract contemplates individual discharge notice to each employee and guarantees each employee discharged the right to receive written reasons for his discharge, which he may contest through the grievance procedure, a mass discharge is not permissible even for illegal strike action. *Trans World Airlines*, 24 L.A. 95, 100 (Harold M. Gilden, Arbitrator, 1955); *Mary Leila Cotton Mills, Inc.*, 26 A.L. 541, 543-544 (Gerald A. Barrett, Arbitrator, 1956).

Likewise, discharge is usually deemed too severe a penalty for contract violations involving improper failure to report to work due to observing a non-permissible picket line or participation in an unauthorized strike. *Cumberland Undergarment Co.*, 5 L.A. 766 (Copelof, Arbitrator, 1946); *Serrick Corp.*, 32 L.A. 994, 998 (Pearce Davis, Arbitrator, 1959); *Alo Mfg. Co.*, 15 L.A. 715, 725 (Samuel H. Jaffee, Arbitrator, 1950).

Where, as here, both the honoring of the picket line and the subsequent strike were legal, arbitrators regularly require the reinstatement of all strikers, with the same full seniority they would have had they continued at work throughout the period of the picket line and strike. *Wilson & Co.*, 34 L.A. 125 (United States District Judge Sam Perry, Neutral Arbitrator, 1960).

If the events entitling an employee to reinstatement took place during the term of a contract, it is immaterial that the arbitration takes place subsequent to the expiration of the contract. The right to reinstatement having accrued during the contract, its enforcement may take place after expiration of the contract. *Armour & Co.*, 11 L.A. 600, 604-605 (Harold M. Gilden, 1948); *Lane v. Endicott Johnson Corp.*, 11 L.A. 253, 299 N.Y. 725, 75 NYS 2d 171, 87 N.E. 2d 450 (1948). See also *United Steelworkers of America v. New Park Mining Co.*, 10th Cir., 1959, 273 F. 2d 352, where the court found the arbitration clause too indefinite for enforcement but held that the court itself could determine the validity of the discharges and order reinstatement although the contract had long since expired.

Similarly the Pressmen was entitled to a declaratory judgment from the arbitrator, finding that the Pressmen did not violate its no-strike obligations by failing to prevent its members from honoring the Stereotypers' picket line. Such a declaratory award would stand as a bar to a damage suit by the publishers or to claims in future judicial or administrative proceedings that Pressmen had so violated its contract.

Under no circumstances can it be said that the issues of violation of the no-strike clause and of non-employee status of the Pressmen's members, raised by the publishers' letter of December 28, 1959 (Tr. 38) were hypothetical or abstract. They were not hypothetical or abstract on December 28, 1959, when first asserted by the Publishers, and the mere expiration of the contract did not render them hypothetical or abstract. There is nothing else in the complaint which showed they were hypothetical or abstract.

2. The decision below is in conflict with decisions of the Third, Fourth, Fifth and Tenth Circuits in its holding that the federal courts do not have jurisdiction because the conduct alleged as a breach of contract also constitutes an unfair labor practice within the jurisdiction of the National Labor Relations Board (pp. 30b-33b, *infra*).

In *Lodge No. 12, Machinists* v. *Cameron Iron Works, Inc.*, 5th Cir., 1958, 257 F. 2d 467, 475, certiorari denied, 358 U.S. 880, the suit was brought by a union to compel arbitration of a grievance alleging that the discharge of strikers for misconduct during a strike violated the contract. One of the defenses was preemption by the National Labor Relations Board. The court rejected this defense and decreed

specific enforcement of the arbitration clause, stating:

> "The second ground of defense presents the question of whether parties to a collective bargaining agreement may contract to submit matters involving unfair labor practices to private arbitrators with such contract enforceable by the federal courts under section 301 of the Act, or whether all controversies concerning unfair labor practices are within the exclusive jurisdiction of the National Labor Relations Board which pre-empts the federal courts from acquiring jurisdiction over a contract violation which happens also to be an unfair labor practice. This question has not been raised previously in this Court, nor has it been decided by the Supreme Court.
>
> "The appellee asserts that since the discharges were made because of *union activity*—protected or unprotected—which presents the question of unfair labor practice vel non, and since the exclusive jurisdiction of the Board pre-empts state courts and agencies from deciding issues involving such unfair labor practices, certainly the parties cannot by contract give to private arbitrators more jurisdiction than is afforded to state courts. However, the Appellee overlooks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*. If an arbitrable contract violation encompasses an unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the pre-emptive area. Likewise, the better-reasoned cases hold that even where the aggrieved incident or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the federal district courts will not be deprived of jurisdiction to grant relief as to the breach of contract, the other aspect being left to the Board.

"However, in this case, we must go one step further because substantially the same conduct here involved would constitute a violation of the contract and an unfair labor practice. The distinguishing point is that, while an act may be both an arbitrable contract violation and an unfair labor practice, a 'breach of contract is not an unfair labor practice'; the former is enforced by the courts, the latter by the Board; the former gives to private parties a remedy, the latter uses a private right to effectuate the declared policies of the Act; the former gives a certainty of decisions, the latter leaves decision discretionary. * * *" (Italics the Court's)

The same principle was enunciated and applied in *Independent Petroleum Workers v. Esso Standard Oil Co.*, 3rd Cir., 1956, 235 F. 2d 401; *Textile Workers v. Aristo Mills Co.*, 4th Cir., 1951, 193 F. 2d 529, 533-534; *United Steelworkers v. New Park Mining Co.*, 10th Cir., 1959, 273 F. 2d 352, 357-358.

The legislative history of the National Labor Relations Act establishes that the foregoing decisions of the Third, Fourth, Fifth and Tenth Circuit are correct. During the Congressional proceedings prior to enactment of the Labor Management Relations Act efforts were made to vest in the National Labor Relations Board jurisdiction over breaches of contract. Congress rejected these proposals. See House Conference Report No. 510, on H.R. 3020, 80th Cong., 1st Sess., pp. 41-42 (1 Leg. His. LMRA pp. 545-546) which states:

"The Senate amendment contained a provision which does not appear in section 8 of existing law. This provision would have made it an unfair labor practice to violate the terms of a collective

> bargaining agreement or an agreement to submit a labor dispute to arbitration. The conference agreement omits this provision of the Senate amendment. Once parties have made a collective bargaining contract the enforcement of that contract should be left to the usual processes of the law and not to the National Labor Relations Board."

This Court should review the decision below in order to resolve this conflict among the circuits.

3. The issues presented are both of substantial public importance. This Court's decisions holding that courts are not to screen grievances for merit, will be rendered meaningless if courts may refuse to enforce arbitration on the ground that the grievance is not one for which any substantial remedy is available. And an even greater number of grievances will be denied arbitration if their unfair labor aspects place them beyond the jurisdiction of the courts. Almost any grievance can be viewed as presenting issues cognizable by the National Labor Relations Board either because the employee conduct was protected by the National Labor Relations Act or the employer conduct was motivated by anti-union animus or the employer failed to bargain collectively by not negotiating the issues fully and in good faith.

CONCLUSION

For the foregoing reas is respectfully urged that this Court should iss s writ of certiorari to review the decision below.

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March 17, 1961

APPENDIX "A"

Opinion of the United States District Court for the District of Oregon, issued April 14, 1960 (R. 46-67):

Kilkenny, J:

Defendants move to dismiss plaintiff's complaint and this action on the grounds that the court lacks jurisdiction over the subject matter and that the complaint fails to state a claim upon which relief can be granted.

Plaintiff is an unincorporated association of individuals, with its principal office and place of business in Portland, Oregon. It is a labor organization, with a membership of approximately 150 individuals, and represents those persons in an industry effecting commerce as defined in the Labor-Management Relations Act of 1947. Defendants are corporations organized under the laws of the State of Oregon engaged in the publication of daily newspapers in Portland. Defendants utilize substantial amounts of raw materials imported by them into the State of Oregon from other states in the union. They distribute their newspapers and other products in the states of California, Idaho, Washington and others. Such activities of defendants affect "commerce" within the meaning of the word as defined by the Labor-Management Relations Act of 1947.

Approximately 120 members of plaintiff were employed as pressroom employees of one or the other of defendants, or both. The employees performed services in the production of newspapers for defendants. The plaintiff was the exclusive representative of the employees of each of defendants for purposes of collective

bargaining with respect to wages, hours of work and other conditions of employment.

Effective January 1, 1958, plaintiff and defendants entered into a collective bargaining agreement governing wages, hours and working conditions of the pressroom employees of defendants, and each of them, said contract to expire on the 31st day of December, 1959. Under appropriate provisions of the agreement the parties commenced negotiations on September 28, 1959, for a new agreement and such negotiations continued until November 10, 1959, and thereafter as hereinafter recited. On November 10, 1959, Stereotypers Local Union No. 48 and the members thereof commenced a strike against each of defendants, and placed picket lines at the newspaper publishing plants of each of defendants, which picket lines have been continuously maintained by said union, and the members thereof, from the 10th day of November, 1959, to date. In said strike the said Stereotypers Union, and the members thereof, are making certain contentions. Plaintiff at all times after November 10, 1959, and until January 2, 1960, "unequivocally advised its members of its and their obligation not to strike and not to engage in work stoppages while the contract between the plaintiff and defendants remained in effect."

Notwithstanding such unequivocal advice, the individual members of the plaintiff who were and are pressroom employees of each of defendants declined to cross the picket lines maintained by the members of the Stereotypers Union and declined to report for or to perform their work in the production of the defend-

ants' newspapers from and after the 10th day of November, 1959, until the 2nd day of January, 1960, and the said individual members of plaintiff union previously employed by defendants at the time of the commencement of said strike continued to refuse to cross such picket lines and refused to work for defendants in defendants' plants behind such picket lines. From November 18, 1959, to the filing of the complaint, no representative of either of the defendants called or requested a meeting for the purpose of conducting further negotiations with reference to the terms of a new agreement to supplant or supersede the agreement which expired on the 2nd day of January, 1960. On December 27, 1959, the plaintiff addressed a communication to each of defendants advising of the fact that the old contract would expire on December 31, 1959, and demanding a meeting of representatives for the purpose of negotiating a new contract. On December 28, 1959, defendants directed a letter to plaintiff as follows:

"* * *

"On November 10, 1959, the Stereotypers' Union started a strike against the Oregonian and Journal publishing companies. Your union and its members failed and refused to honor the then existing agreement between the publishing companies and Portland Web Pressmen's Union No. 17. This failure and refusal occurred notwithstanding the fact that under the agreement your union and its members had pledged themselves not to strike.

"The refusal by the members of your union to comply with their obligations to the publishers and their

refusal to carry out the instructions given them by the publishers to perform their duties have continued without interruption since November 10, 1959. The pressmen who have failed to appear for work over this long extended period are no longer employees.

"With respect to meeting for the purpose of negotiating a new contract, we are ready to meet with you at any time you can establish that you represent a majority of our employees in an appropriate unit. * * * (signatures)."

After receipt of said letter, plaintiff addressed a night letter to said defendants, which reads as follows:

"This acknowledges on behalf of Portland Web Pressmen's Local 17 receipt late today of your letter of December 28, 1959, in which you take the position that pressroom employees governed, along with you, by our current agreement which remains in effect through December 31, 1959, are no longer employees of your two newspapers. Local 17 emphatically disagrees.

"If you had a grievance in this respect since November 10, you should have resorted to the settlement procedures provided for in our joint and effective agreement.

"Local 17 hereby refers the differences between the parties arising out of your said letter of December 28, 1959, to the Joint Standing Committee, and requests a meeting on these emergency issues forthwith. Certainly, there is no occasion for either the publishers of the union to take refuge in the 'within five days' provision to delay such a meeting beyond sometime on the 29th day of December, 1959.

"Our Standing Committee members stand ready to meet with the publisher members of the same committee upon the shortest telephone notice to the undersigned at or through CH 4-8359."

Neither of defendants responded to such night letter. On January 2, 1960, plaintiff declared itself and its members on strike against defendants, and each of them, under the claim that defendants had refused to bargain with the plaintiff as the exclusive representative of the pressroom employees of the defendants with reference to wages, hours and other conditions of work, and also to enforce plaintiff's proposals for a new contract to supplant and supersede the agreement between the parties. On January 4, 1960, plaintiff addressed another communication to defendants, the material portion of which reads as follows:

"* * *

"The undersigned, Union appointed members of the Joint Standing Committee, hereby call upon the newspaper appointees of the same committee to meet with them without further delay to deal with the above mentioned differences between the parties to the basic agreement. Those differences having arisen prior to January 1, 1960, and having been referred to the Joint Standing Committee prior to that date, the Union position is that the entire adjustment of differences procedures which are provided for in the basic agreement remain available and applicable to the parties, and obligatory upon them until the differences have reached final determination through utilization, and, if necessary, exhaustion of those procedures.

"The undersigned are ready to meet at your call upon any short but reasonable notice. You are earnestly requested to arrange a Joint Standing Committee meeting to handle these differences. Should you fail to arrange such a meeting to be held prior to Monday, January 11, 1960, the undersigned and the Union for its protection and the protection of its members will be obligated to take such legal actions as are indicated in the premises."

On January 11, 1960, defendants directed a communication to plaintiff, which reads as follows:

"The Oregonian and the Oregon Journal have received and given careful consideration to your letter of January 4 addressed to the attention of Messrs. Morrish and Haines, and do not agree with the positions you have taken. It therefore appears that no useful purpose would be served by complying with your request."

Plaintiff claims that a justiciable controversy exists between the plaintiff and the defendants and that the court has jurisdiction over the subject matter of the suit under the provisions of the Labor-Management Relations Act of 1947, 29 U.S.C.A. §185.

Among other provisions, the contract between the parties contains the following:

"Section 3(a). The Union is recognized as the collective bargaining agency for employes engaged in the operation of all web presses. * * *

* * *

"Section 4. A joint Standing Committee, composed of two representatives of the parties of the first part and two representatives of the party of the second part shall be appointed. * * * To this committee shall be referred all questions which may arise concerning the construction to be placed upon any clause of this contract or alleged violation thereof which cannot be settled otherwise. * * * The standing committee shall have jurisdiction to determine whether the disputed issue is covered by the terms of this contract. * * *

"Section 5. It is agreed that fruitless controversies must be avoided, and every effort made to maintain good feeling and harmonious relations. To accomplish this both parties will in every instance give prompt attention to disputes and will in good faith endeavor to settle all differences by conciliation. Under all circumstances business shall be continued without interference or interruption in a regular and orderly manner, until the dispute is settled by the method set forth in Section 4 of this contract. * * *

* * *

"Section 20. The authority over the pressroom shall be vested in the Companies. Each Company will appoint one foreman to supervise the operation of its pressroom. The foreman shall at no time be considered to be a member of any operating crew and shall be a member of the Union. All working time belongs to the Companies and pressroom employes and crews shall perform any work pertaining to the Web Pressmen's trade which may be required of them by the foreman. Employes may not leave the office during working hours except

with permission of the foreman and no chapel meetings of any kind shall be held during working hours, except by general agreement between the chapel chairman and the foreman.

* * *

"Section 24. During the life of this agreement the party of the second part agrees not to strike and the parties of the second part agree not to lockout the party of the second part. The union reserves the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher where a strike or lockout exists which has been authorized by the International Printing Pressmen's and Assistants' Union of North America." (Emphasis added.)

The above facts appear in the complaint. The relief sought by the plaintiff is dual in nature. First, the plaintiff demands declaratory relief in connection with the following problems:

(1) Did defendants have the right to terminate the employment of plaintiff's members.

(2) Are defendants required to invoke the procedures outlined in Section 4 of the contract.

(3) Are defendants obligated to participate in the procedures of Section 4 under the facts stated in the complaint.

(4) Does such obligation, if any, continue to exist. Second, plaintiff demands an injunction against defendants requiring the defendants to carry out the obligations, if any, declared to be binding upon defendants

1. Under the provisions of Title 28, U.S.C.A. §§1331 and 1332, the jurisdiction of a federal court cannot be invoked unless: (1) the controversy arises under the constitution, laws or treaties of the United States and involves $10,000; or (2) a controversy involving $10,000 arises between citizens of different states.

On oral argument counsel for the plaintiff conceded that independent federal jurisdiction was not conferred by either the United States Arbitration Act or the Federal Declaratory Judgments Act. It is plaintiff's contention that jurisdiction rests in the Federal courts until Title 29, U.S.C.A. §185, which provides:

"(a) Suits for violation of contracts between an employer and a labor organization * * * may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Said section confers jurisdiction upon the Federal courts to render a declaratory judgment on an existing contract. Kennametal, Inc., v. International Union, 161 F. Supp. 362 (D.C.W.D. Pa. 1958); Employing Plasterer's Association of Chicago v. Operative Plasterers, etc., 172 F. Supp. 337 (D.C.N.D. Ill., 1959). Said section extends jurisdiction in a proper case to actions for specific performance of an arbitration agreement. Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957). Jurisdiction under the Declaratory Judgments Act has been consistently refused where the relief sought involves an expired union contract. Shank v. N.L.R.B.,

7 Cir., 1958, 260 F. 2d 444; Mackay v. Loew's, Incorporated, (D.C.S.D. Cal., 1949) 84 F. Supp. 676; Textile Workers Union v. Bates Mfg. Co., 158 F. Supp. 410, (D.C. Me., 1958).

We must now approach the question as to whether the complaint states sufficient facts to show a justiciable controversy. A justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is abstract or moot. The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227; St. Pierre v. U.S., 319 U.S. 41.

The contract described in the complaint expired on December 31, 1959, and the complaint was not filed until January 15, 1960. I find nothing in the complaint which alleged any right in the plaintiff or its members which was vested during the term of the contract. It might be argued that the complaint shows a disagreement as to the employment status of the plaintiff's members as of December 28, 1959, when the plaintiff attempted to invoke the procedures provided by Section 4 of the contract. However, the plaintiffs had refused to work since November 10, 1959, and in my opinion, the members and the union had clearly violated the "No Work Stoppage" and "No Strike" provisions of the contract when the members refused to work on and subsequent

to November 10, 1959. The period of time from the date of demand on December 28, 1959 to December 31, 1959 is so minimal that the doctrine of "de minimis" should be applied. This doctrine has been recognized in the federal courts. Hunter v. Madison Avenue Corp., 6 Cir., 1949, 174 F. 2d 164, 167. The doctrine means that the law does not care for small things. Porter v. Rushing, 65 F. Supp. 759, 760. The doctrine means that the law does not bother with trifles. Dennison West 25th Street Implement Co. v. Great Atlantic & Pacific Tea Co., (Ohio App.) 69 N.E. 2d 79, 80.

Since, in any event, the ultimate relief which would be granted would be limited to determining the status during the last few days of the contract, the Court should not take jurisdiction.

Plaintiff's counsel attach great importance to the decision of the United States Supreme Court in Textile Workers Union v. Lincoln Mills of Alabama, supra. This case, in my opinion, supports the position of the defendants, rather than that of the plaintiff. The wage claims involved in the Lincoln case accrued during the life of the contract and these claims were vested rights on which the Court exercised its jurisdiction. The opinion went on to say that the matters which created no vested rights could not be considered. There is no claim in this case that wage or any other claim, other than the claim of the right to arbitrate, is involved.

Item Company v. New Orleans Newspaper Guild, 5 Cir., 1958, 256 F. 2d 855; Wilson Bros. v. Textile Workers Union, (D.C.S.D. N.Y., 1954) 132 F. Supp.

163; Local No. 250 v. Glendale Mfg. Co., (D.C.W.D. North Carolina, 1969) 179 F. Supp. 222; United Steel Workers v. New Park Mining Co., 10 Cir., 1959, 273 F. 2d 352, do not support the plaintiff's position. Accrued substantive rights were involved in each one of these cases. Furthermore, in United Steel Workers, the vital element of "unwillingness to work" was not present.

The language of the contract makes it absolutely clear that the parties intended to provide an orderly method for the settlement of disputes and that there would be no work stoppage or strike. Without question, the plaintiff understood that neither plaintiff nor its members had the right to stop work. The complaint alleges that the plaintiff unequivocally advised its members of its and their obligation not to strike and not to engage in work stoppages, while the contract between the parties remained in effect. The complaint also shows that notwithstanding the advice of the plaintiff, every member of the plaintiff declined to cross the picket lines maintained by the other union and refused to report for or perform their work in production of defendants' newspapers behind the picket line from November 10, 1959, until the expiration of the contract. I am of the opinion that the intention of the parties to the contract is clear and that it is unnecessary to invoke any of the rules of contractual construction. However, if we resort to well-known rules of construction, there can be no question of the intention of the parties in connection with the plaintiff's contractual obligations to continue with its work, irrespective of picket lines.

I shall state a few applicable rules of construction.

The law does not permit a contract to be remade by the Courts. Dermott v. Jones, 69 U.S. 1; Lowber v. Bangs, 69 U.S. 728; Gavinzel v. Crump, 89 U.S. 308; Pressed Steel Car Co. v. U.S., 157 F. Supp. 950, cert. den'd. 356 U.S. 967. In construing a contract, the court must examine all of its parts. Black v. United States, 91 U.S. 267; Cove Irrigation District v. American Surety Company, 9 Cir., 1930, 42 F. 2d 957, cert. den'd. 282 U.S. 891. A business contract must be construed with such business sense as it naturally would be understood by intelligent men of affairs. E. I. DuPont DeNemours & Co. v. Clairborne-Reno Co., 8 Cir., 1933, 64 F. 2d 224; Erie Railway Co. v. Ohio Public Service Co., 6 Cir., 1932, 62 F. 2d 83. It is clear that each of the parties, and in particular the plaintiff, construed this contract so as to require the members of the union to cross the picket line. Otherwise, the plaintiff would not have directed its members to continue work and cross the picket line. The practical construction or interpretation of a contract by the parties is entitled to great weight in determining its proper interpretation. Steinbach v. Stewart, 78 U.S. 566; City of Chicago v. Sheldon, 76 U.S. 50. The practical construction against interest, by a party to a contract, may constitute the strongest evidence of intent. Cutting v. Bryan, 9 Cir., 1929, 30 F. 2d 754, cert. den'd. 279 U.S. 860; U. S. v. Miller, 2 Cir., 1936, 81 F. 2d 8. As previously mentioned, the only exception to the no strike clause in the contract deals with a subject not here in controversy. Since only one exception is mentioner, the rule of expressio unius est exclusio alterius would be applicable and all exceptions not

mentioned would be excluded. United States v. Powelson, 4 Cir., 1941, 118 F. 2d 79, 88; 12 Am. Jur., Contracts, §239, p. 769. The Oregon Supreme Court applies the same rules of construction as the Federal Courts above mentioned. Biersdorf v. Putnam, 181 Or. 522, 182 P. 2d 992; Courteen Seed Co. v. Abraham, 129 Or. 427, 275 P. 684; Nunner v. Erickson, 151 Or. 575, 51 P. 2d 839; Dorsey v. Oregon-Washington Railroad & Navigation Co., 148 Or. 648, 38 P.2d 72; Kontz v. B. P. John Furniture Co., 167 Or. 187, 115 P. 2d 319; Markham, etc. v. International Woodworkers of America, etc., 170 Or. 517, 135 P. 25 727.

The failure of an employee to cross a picket line to perform his job violates the no strike provision of an agreement. NLRB v. Rockaway News Supply Co., 345 U.S. 71. The union must be held responsible for the mass action of its members. United States v. International Union, (Md. 1948) 77 F. Supp. 563, aff'd 177 F. 2d 29, cert. den'd, 338 U.S. 871; United States v. Brotherhood of Railroad Trainmen, etc., (N.D. Ill., 1951) 96 F. Supp. 478. Since the prevention of a strike is the chief advantage which an employer can reasonably expect from a collective bargaining agreement, the failure to cross the picket line was a material breach of the contract. United Electrical, Radio & Machine Workers v. NLRB, (1955) 223 F. 2d 338, cert. den'd 350 U.S. 981, rehearing den'd, 351 U.S. 915; Boeing Airplane Co. v. Machinists, etc., (D.C. Wash., 1950) 91 F. Supp. 596, aff'd 9 Cir., 1951, 188 F. 2d 356, cert. den'd 342 U.S. 821. The no strike clause is the very heart of a labor relations agreement. Boeing Airplane

Co. v. Machinists, etc., supra. The violation of the no strike clause destroys the union's right to compel arbitration. Cuneo Press v. Kokomo Paper, 7 Cir., 1956, 235 F. 2d 108, cert. den'd, 352 U.S. 912; W. L. Mead, Inc. v. International Brotherhood of Teamsters, etc., (U.S.D.C. Mass., 1955) 129 F. Supp. 313, aff'd 230 F. 2d 576, dism'd, 352 U.S. 802.

NLRB v. Knight Morely Corp., 6 Cir., 1958, 251 F. 2d 753, does not support the plaintiff's position. If anything, it supports defendants' contention that the National Labor Relations Board has jurisdiction over all questions in this case dealing with any right to reinstatement or further representation. In that case, the vested and accrued rights of 103 discharged employees were involved and such rights vested prior to the expiration of the contract.

From the history of the National Labor Relations Act and from the decisions rendered thereunder, it is manifest that the purpose of the Act was to establish a single paramount administrative or quasi-judicial authority to develop new federal law relating to collective bargaining and the only rights made enforceable by the Act are those determined by the Board to exist under the facts of each case. National Licorice Co. v. NLRB, 309 U.S. 350; Amazon Cotton Mill Co. v. Textile Workers Union, 4 Cir., 1948, 167 F. 2d 183.

The contract between the parties cannot be read without arriving at the conclusion that the plaintiff and the defendant desired to absolutely prevent work stoppages, strikes and production interruptions of all kinds

during the life of the contract. The contract specifically provides that the plaintiff should not strike and that defendants should not lock out the plaintiff. This intention is made doubly clear by the language of Section 20, which requires plaintiff and its members to do all work pertaining to their trade which may be required of them, and that the plaintiff's members should not leave the plant during working hours except with permission, and that no meetings of any kind should be held during working hours, except by special agreement. This intention is further buttressed by the language of Section 5 which requires that business shall be continued, under all circumstances, without interference or interruption in a regular and ordinary manner, until any dispute is settled by the method as set forth in Section 4 of the contract. The only reservation of a right to strike under the contract is set forth in Section 24 following the plaintiff's agreement not to strike where plaintiff reserves the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher where a strike or lock out exists which had been authorized by the International Printing Pressmen's & Assistants' Union of North America. There is no claim by the plaintiff that any such strike existed in this dispute.

Without question, the obligation of the plaintiff and its members to continue work was required as one of the steps in the grievance procedure. Full performance of Section 5 of the contract is a requisite to a demand for performance under Section 4. Cuneo Press v. Kokomo Paper Handlers' Union, supra; Peoples v. Southern

Pacific Co., supra. The plaintiff cannot ignore the portion of the grievance procedure under which it is obligated and at the same time require performance by defendant of another requirement of the same procedure. Cuneo Press v. Kokomo Paper Handlers' Union, supra; Peoples v. Southern Pacific Co., supra; Textile Union Workers v. Lincoln Mills, supra.

To comment on each case cited by plaintiff would unduly lengthen this already protracted opinion. It is my considered judgment that plaintiff's cases are not in point. Armstrong-Norwalk Rubber Corp. v. Local Union #283, (Conn., 1958), 167 F. Supp. 817, does not support the plaintiff's position. In that case the employees were back at work when they sought to invoke the arbitration provision. The arbitration clause in that case contained no such provision as that contained in Section 5 of this contract. I do not pass on the legal question of whether the arbitrator, under the language of the instant case, should determine whether the issues in question were to be arbitrated. Since I have held that the agreement to arbitrate is not enforceable, the other question is moot. Tenney Engineering, Inc., v. United Electrical, Radio & Machine Workers of America, (D.C. N.J., 1959) 174 F. Supp. 878, app. dism'd, 2 Cir., 1959, 267 F. 2d 618, does not present the same set of facts as involved in the present case. In the Tenney case, the employer instituted an action for damages for breach of a no strike clause by the union. The court granted the stay pending arbitration. There was no continuing breach of the contract such as here. As in both the Signal-Stat case and the Armstrong case, the employees

were working at the time the action was commenced. In Signal-Stat Corp. v. Local #475, 2 Cir., 1956, 235 F. 2d 298, cert. den'd, 354 U.S. 911, reh. den'd, 355 U.S. 852, the union struck over a discharge grievance. The issue in that case was whether union liability and damages for breach of a no strike clause is an arbitrable issue. The only issue actually decided by the Court in Signal-Stat was whether the dispute of breach of a no strike clause was arbitrable under the particular arbitration clause. The court held that it was. No place in that decision did the Court have occasion to approach the question of whether a union which breaches both a no strike clause and the arbitration clause can itself enforce such clause. As a matter of fact, the members of the union in that case had returned to work, which element is entirely lacking in the present case.

In NLRB v. Rockaway News Supply, 345 U.S. 71, cited by plaintiff, the holding was that an individual employee's refusal to cross a picket line breached a no strike clause and that therefore, his employer's discharging him for such conduct did not violate the Labor Relations Act. The substance of the holding in that case was that the entire contract was not rendered void by an illegal clause and that the no strike clause was enforceable and was breached by the employee and that whether or not prior arbitration exists, the discharge of an employee under the Labor Management Relations Act is perfectly proper if he breaches a no strike clause. I do not believe that case has anything to do with the issue of whether arbitration is enforceable by a party which is in continuing violation of

the agreement, only a portion of which it seeks to enforce.

Tenney Engineering, Inc. v. United Electrical, Radio & Machine Workers, etc., supra, is readily distinguished from the case at bar. It is true that Tenney criticizes the decision in Cuneo and proceeds to use what I believe to be the same faulty reasoning which was used in the Armstrong case. In other works, the court compels arbitration on the issue of whether the union can compel arbitration. I am of the opinion that the better reasoned cases hold that the party in default and refusing to perform an essential part of the contract is in no position to insist on part performance of the portion of the contract which may be favorable to it. In any event, the factual situation was entirely different, in that the employees in the Tenney case had returned to work and there was no continuing breach as exists in the present case. In the Tenney case, the court holds that the arbitrator, and not the court, should determine whether the union was in default or could compel arbitration. This conclusion, in my opinion, is not sound. From the statement of facts in the present case, there would seem to be three disputes:

(a) that dispute which caused the strike which, like in Tenney, was a dispute with the Stereotypers union;

(b) the possible claim of the defendants against the plaintiff for damages for breach of contract, such as was made in Tenney; and

(c) the grievance of plaintiff concerning the employ-

er's position that the employee status of plaintiff's members was terminated.

Only the third dispute is involved in this case. That type of dispute was not involved in Tenney. Plaintiff is the one who should assert this grievance and did so by the letter of December 28, 1959. At that time, also unlike Tenney, plaintiff and its members were still on strike and in breach of the contract and such strike continued until after the expiration date of the contract. No such facts were involved in Tenney.

At first glance, Encinal Terminal (4 LRRM 117) would seem to support the plaintiff's position that the employees had no obligation to go through the picket line. However, the contract in that case was entirely different than the contract before this court. The contract in Encinal did not contain a no strike clause, but did contain a provision requiring submission of the union's disputes to the grievance committee. In the Encinal case, the court reasoned that "in the absence of an express agreement" the members of the union would not be required to pass through the picket line. There is an express no strike agreement in the contract before this court. I have already construed this contract to require the plaintiff and its members to pass through the picket line. Likewise, as previously pointed out, the plaintiff itself so construed the contract.

I conclude:

1. That plaintiff's complaint does not present facts showing a justiciable question which could be the basis of declaratory relief.

2. That the court has no jurisdiction over the subject of the suit. The rights of plaintiff, if any, which might exist would arise by reason of the Labor Relations Act and exclusive jurisdiction would be with the National Labor Relations Board.

Counsel for defendants may prepare, serve and present to the Court an appropriate judgment of dismissal.

APPENDIX "B"

Opinion of the United States Court of Appeals for the Ninth Circuit, entered December 19, 1960 (R. 78-88):

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17, an unincorporated association, *Appellant*,	)	
vs.	)	No. 16,892
	)	Dec. 19, 1960
OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY, corporations, and each of them, *Appellees*.	)	

Appeal from the United States District Court for the District of Oregon.

Before: HAMLEY, HAMLIN and JERTBERG, Circuit Judges. HAMLIN, Circuit Judge.

In March of 1958, the appellant, Portland Web Pressmen's Union, Local No. 17, hereinafter called the Pressmen, entered into a collective bargaining agreement with appellees, Oregonian Publishing Company and Journal Publishing Company, hereinafter called the Publishers. By its terms the contract was to run until December 31, 1959, and thereafter from year to year unless written notice of termination was given by either party. On or about September 28, 1959, the Pressmen gave notice that the agreement would be terminated. Therefore, the contract was to expire and did expire on December 31, 1959.

On November 10, 1959, the members of the Stereo-

typers Local Union No. 48, an association unconnected with the Pressmen, commenced a strike against the Publishers, and established picket lines at the Publishers' plants. Although the Pressmen advised its members not to strike or engage in any work stoppage, each and every member of the Pressmen refused to cross the picket line that had been established by the Stereotypers. Even the Pressmen's officials, who had advised the members not to participate in a work stoppage, refused to cross the picket lines. This situation continued until January 2, 1960, two days after the expiration of the collective bargaining agreement. On that date, the Pressmen officially called a strike against the Publishers.

Subsequent to the work stoppage on November 10th no action was taken by either party until December 27, 1959, when the correspondence that ultimately resulted in this suit commenced.

On December 27, four days before the contract was to expire, the Pressmen sent a letter to the Publishers requesting that the parties meet in order that a new contract be reached to replace the prior agreement which was to expire.[1] This letter makes no reference to ending

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[1] "Gentlemen:

Portland Web Pressmen's Local No. 17's agreement with your firms will expire on December 31, 1959. The only negotiating session to work out the terms of the new agreement was unproductive of even substantial progress, much less of a settlement.

With a view to arranging for more frequent meetings we attempted to reach you by the usual informal telephone method during the past week. These efforts terminated in an inconclusive telephone talk between Mr. Harold Bamberg, representing Local 17, and Mr. D. S. Haines, speaking for both publishers, in which Mr. Haines expressed serious doubts wether a meeting could be arranged, but undertook to advise Mr. Bamberg on this point.

the work stoppage, but merely states that the union seeks to negotiate for the purpose of consummating a new contract which would govern the parties for future years. On December 28, 1959, the Publishers replied to the Pressmen's letter as follows:

"Gentlemen:

On November 10, 1959, the Stereotypers' Union started a strike against the Oregonian and Journal publishing companies. Your union and its members refused to honor the then existing agreement between the publishing companies and Portland Web Pressmen's Union No. 17. This failure and refusal occurred notwithstanding the fact that under the agreement your union and its members had pledged themselves not to strike.

The refusal of the members of your union to comply with their obligations to the publishers and their refusal to carry out the instructions given them by the publishers to perform their duties have continued without interruption since November 10, 1959. The pressmen who have failed to appear for work over this long extended period are no longer employes.

With respect to meeting for the purpose of negotiating a new contract, we are ready to meet with you at any time you can establish that you represent a majority of our employes in an appropriate unit."

In answer to this letter, the representative of the union sent a night letter to each of the Publishers on December 28:

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* This is a more formal demand for a series of meetings to commence immediately and to continue at least through the next several days, looking to the reaching of agreement prior to expiration of our current agreement . . . .

Local 17 does not believe that the current existence of labor disputes with other labor organizations impairs or derogates from the obligations of both the publishers and this union to meet and treat in good faith with a view to settlement of our differences . . . ."

"Gentlemen:

This acknowledges on behalf of Portland Web Pressmen's Local 17 receipt late today of your letter of December 28, 1959, in which you take the position that pressroom employees governed, along with you, by our current agreement which remains in effect through December 31, 1959, are no longer employees of your two newspapers. Local 17 emphatically disagrees.

If you had a grievance in this respect since November 10 you should have resorted to the settlement procedures provided for in our joint and effective agreement.

Local 17 hereby refers the differences between the parties arising out of your said letter of December 28, 1959, to the Joint Standing Committee, and requests a meeting on these emergency issues forthwith. Certainly, there is no occasion for either the publishers or the union to take refuge in the 'within five days' provision to delay such a meeting beyond sometime on the 29th of December, 1959.

Our Standing Committee members stand ready to meet with the publisher members of the same committee upon the shortest telephone notice to the undersigned at or through CH 4-8359."

The Publishers did not respond to this letter. The contract expired on December 31, 1959; the Pressmen called a strike on January 2, 1960; and on January 4, the union representative again wrote and requested that there be a meeting of the joint standing committee in order that the dispute between the parties be settled. On January 11 the Publishers replied and refused to refer the matters to the committee, taking the position that no useful purpose could be served by compliance with the Pressmen's request. On January 15 the Press-

men filed this suit asking that the court compel the Publishers to submit the controversy to arbitration. The Publishers moved that the complaint be dismissed, and on April 14, 1960, the district court granted their motion. It held that the complaint does not present facts showing a justiciable controversy; that the dispute falls within the exclusive jurisdiction of the National Labor Relations Board; and that the breach of the "no strike agreement" deprives the Pressmen of the right to invoke the arbitration provisions. From that decision the Pressmen bring this appeal. This court has jurisdiction to hear the appeal under 28 U.S.C.A. § 1291.

Under § 301 of the Labor Management Relations Act, 29 U.S.C.A. 185, the federal courts are empowered to compel arbitration under collective bargaining agreements, provided that the movants establish a contractual right to arbitrate. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448 (1957). It is therefore necessary to turn to the contract between the parties to see if it creates a legally enforceable duty to arbitrate the dispute presented here. The pertinent provisions of the contract between the Pressmen and the Publishers are contained in the following sections.

> Section 4. A joint Standing Committee, composed of two representatives of the parties of the first part and two representatives of the party of the second part shall be appointed, the members representing the parties of the first part shall be selected by the publishers and the members representing the party of the second part shall be selected by the union . . . . To this committee shall be referred all questions which may arise concerning the construction to be placed upon any clause of this con-

tract or alleged violation thereof which can not be setled otherwise . . . . The standing committee shall have jurisdiction to determine whether the disputed issue is covered by the terms of this contract. The joint committee shall meet within five days, when any question of difference shall have been referred to it for decision by the executive officers of either party to this contract . . . .

Section 5. It is agreed that fruitless controversies must be avoided, and every effort made to maintain good feeling and harmonious relations. To accomplish this both parties will in every instance give prompt attention to disputes and will in good faith endeavor to settle all differences by conciliation. Under all circumstances business shall be continued without interference or interruption in a regular and orderly manner, until the dispute is settled by the method set forth in Section 4 of this contract.

* * * * *

Section 20. . . . Neglect of duty, violation of conspicuously posted Company rules or incompetency shall be grounds for discharge which may be appealed under the grievance procedure elsewhere provided in this contract . . . Discharged employes shall have no right to work as a substitute or regular unless reinstated by the foreman or by the joint standing committee. The Joint Standing Committee shall have authority to determine how, if any, back pay shall be awarded a reinstated employee.

* * * * *

Section 24. During the life of this agreement the party of the second part agrees not to strike and the parties of the first part agree not to lockout the party of the second part. The union reserves the right to refuse to execute any struck work received from or destined to any unfair employing printer or publisher where a strike or lockout exists which has been authorized by the International Printing Pressmen's and Assistants' Union of North America.

We shall first consider the conclusion of the district court that plaintiff's complaint did not present facts showing a justiciable question which could be the basis of declaratory relief.

There is no claim that during the life of the contract anything occurred which entitled any of the individual members of Pressmen to compensation. They suffered no grievance during the life of the contract that is compensable in any way. Not a single member was willing or did report for work from the tenth of November, 1959, until after the filing of this action on January 15, 1960.[2] There is no dispute upon this point, for it is readily admitted by the Pressmen. No arbitrator could award back pay to men who were at all times unwilling to work and who actually did not work.

The sole issue that was in dispute between the Pressmen and the Publishers was the technical question of whether the union members who had not worked since November 10th, who had willfully refused to work since that time, who did not intend to work, and who claimed they were not on strike should or should not be technically called employees between December 28 and December 31, 1959.

As is stated in *Aetna Life Insurance* v. *Haworth*, 300 U.S. 227 (1937) at 240:

> "A justiciable controversy is distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska SS. Co.*, 253 U.S. 113, at

[2] The Pressmen were still on strike when this appeal was argued on November 1, 1960.

> 116. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." [Citations omitted]

Whether the members of Pressmen in this case technically were or were not employees during the brief period in question was of no substantial importance under the contract. It was an "abstract" and "hypothetical" question. If an arbitration committee had made a finding either way, no order that it could have made would have altered the rights or remedies of either party under the contract. We agree with the district court that the complaint presented no facts showing a justiciable question which could be the basis of declaratory relief.

We likewise agree with the district court that any rights which appellant Pressmen might claim would arise under the National Labor Relations Act and that exclusive jurisdiction would be with the National Labor Relations Board.

By the letter of December 27, 1959, the Pressmen state that the only matter with which they are concerned is the right to act as the bargaining agent of the plant workers.[3] The Pressmen raised the question of the status of the employees only after they had received the Publishers' answer. The right that they are seeking to assert is not the right of the individual workers to return to work or to be awarded back pay. They are seeking the right to bargain collectively with the publishers as

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[3] See footnote No. 1.

exclusive representative of the pressroom employees of the publishers.

In this regard it is interesting to note the union's own statement of the reason that a strike was called on January 2, 1960. Paragraph 15 of the union's complaint in this action reads:

> "On the 2nd day of January, 1960, plaintiff declared itself and its members on strike against the defendants, and each of them, in protest against the refusal of defendants, and each of them, to bargain collectively with plaintiff as exclusive representative of the pressroom employees of defendants, and each of them, with respect to their wages, hours, and other conditions of work, and also to enforce plaintiff's proposals for a new contract to supplant and supersede the agreement between the parties, which is Exhibit A of this Complaint, and in resistance to the counter-proposals of defendants, and each of them, for a new agreement to supplant and supersede the agreement between the parties, which is Exhibit A to this Complaint."

This statement demonstrates that two days after the expiration of the old contract, the union was not concerned with the rights of the individual members of the union but was rather concerned with the failure of the Publishers to recognize the union as the bargaining representative of the pressroom workers.

Whether the Pressmen represented the employees of the Publishers and whether the Pressmen was the proper bargaining agent for the Publishers to deal with in negotiating a new contract, are questions that the N.L.R.B can properly determine. In fact, the parties could not by private agreement take away from the Board the right to make those determinations

If the Publishers refuse to bargain collectively with the representative of its employees, it is guilty of an unfair labor practice.[4] If the Publishers are guilty of any unfair labor practice, the Board has power to intervene and correct the abuses.[5] "The N.L.R.B. is empowered to issue complaints whenever 'it is charged' that any person subject to the Act is engaged in any proscribed unfair labor practice.", *Teamsters Union* v. *New York, N. H. & H. RR.*, 350 U.S. 155 (1956) at 160.

In *Amazon Cotton Mill Co.* v. *Textile Workers' Union*, an action brought by the union to compel the employer to bargain (the members of the union being on strike), the district court issued an interlocutory injunction requiring the employer to bargain with the union. The Court of Appeals reversed, saying:

> "It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was 'to establish a single paramount administrative quasi-judicial authority in connection with the development of federal American law regarding collective bargaining': that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined."[6]

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[4] "It shall be an unfair labor practice for an employer * * * (5) to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C.A. § 158(a)(5).

[5] "The Board is empowered as hereinafter provided to prevent any person from engaging in any unfair labor practice . . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise . . . ." 29 U.S.C.A. § 160(a).

[6] *Amazon Cotton Mill Co.* v. *Textile Workers' Union*, 167 F.2d 183 (4 Cir. 1948) at 186.

In *Textile Workers' Union* v. *Arista Mills Co.*, 193 F.2d 529 (4 Cir. 1951), the same court of appeals affirmed the doctrine stated in *Amazon Cotton*, and quoted with approval the following statement made by Chief Judge Jones in *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949):

> "It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. Whether acts which constitute unfair labor practices under the statute have been committed by an employer and, if so, what remedies will be prescribed for the employees are matters within the exclusive jurisdiction of the Board. . . . If, however, a particular act is the subject of an agreement between employer and union and the union sues for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only a breach of contract but also an unfair labor practice."

The facts of the *Reed* case clearly involved the meaning of language that had been used in a contract betweeen the employer and the union and involved substantial rights of the parties. In the case presently under consideration, we have pointed out that no substantial rights of the employees under the contract were involved, and no question is raised concerning the interpretation to be placed on the contract been the parties which expired on December 31, 1959.

Mr. Justice Frankfurter had occasion to discuss the jurisdiction of the N.L.R.B. in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959). He said, at page 244

> "When it is clear or may fairly be assumed that

> the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield.
> * * *
>
> "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

We believe that where the question between the parties is whether one or the other has been guilty of an unfair labor practice and there are no substantial contract violations involved (and we have found none here) that the exclusive jurisdiction for the settlement of such a dispute should rest with the N.L.R.B.

Nowhere in the record before this court is there any evidence that the individual members of the union have suffered because of the letter written by the Publishers, except to the extent that the Publishers questioned whether the Pressmen represented a majority of their employees. This controversy is specifically covered by the Labor Management Relations Act, 29 U.S.C.A. § 158(a)(5). The only right that the individuals have been denied, if in fact there has been a denial, is a right that has been created for them by statute, the right to have their union bargain collectively for them. The statute that grants the right also establishes the procedure that must be used to enforce the right. The place for them to seek relief is through the N.L.R.B.

Counsel for the Pressmen rely upon three Supreme Court cases decided June 20, 1960. *United Steel Workers of America* v. *American Mfg. Co.*, 363 U.S. 564; *United Steel Workers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steel Workers of America* v. *Enterprise Corporation*, 363 U.S. 593. We do not think that any of these three is in point. In each case the facts showed that the union contended that its members had suffered substantial grievances during the time that the contracts were in effect. In each, if the arbitrator had found that the action of the employer was wrongful, the individual members of the union who were affected by the wrongful action would have been entitled to some compensation. The rights of these individual members were vested in them during the period covered by the contract. As we have pointed out, such facts are not present in this case. The only complaint that the Pressmen make is that the Publishers refused to engage in collective bargaining with it as the representative of its members. There is no claim made that any of the union members would be entitled to any substantial redress even if the arbitrator decided every that was submitted to him in favor of the Pressmen. Settlement of this dispute can only be had by resort to the N.L.R.B. To hold otherwise would be to hold that by a collective bargaining contract the parties are able to take disputes that Congress has consigned to the exclusive jurisdiction of the N.L.R.B. out of the hands of the N.L.R.B. and put them in the hands of a private arbitrator.

Counsel for the Publishers contended in the district

court and in this court that the violation of the no-strike agreement by the members of the Pressmen deprived the union of the right to invoke the arbitration clause of the contrast. In view of our decision and holding as above set out, it is not necessary for us to reach this question, and we expressly decline to pass upon this contention of the Publishers.

Judgment affirmed.

(Endorsed) Opinion Filed Dec. 19, 1960.

Frank H. Schmid, Clerk.

APPENDIX "C"

Judgment of the United States Court of Appeals for the Ninth Circuit entered December 19, 1960 (R. 89):

JUDGMENT

Appeal from the United States District Court for the District of Oregon.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: December 19, 1960
FRANK H. SCHMID, *Clerk*

IL

In the Supreme Court

[illegible]

BRIEF IN OPPOSITION

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Argument	5
Conclusion	17

CITATIONS

Page

CASES

Independent Petroleum Workers v. Esso Standard Oil, 235 F.2d 401 (3rd Cir. 1956) 12, 14

Lodge No. 12, Machinists v. Cameron Iron Works, Inc., 257 F.2d 467 (5th Cir. 1958) 12, 13

Textile Workers v. Arista Mills Co., 193 F.2d 529 (4th Cir. 1951) 12, 14, 15

United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) 7, 8

United Steelworkers v. Enterprise Corp., 363 U.S. 593 (1960) 7, 8

United Steelworkers v. New Park Mining Co., 273 F.2d 352 (10th Cir. 1959) 12, 14

United Steelworkers v. Warrior & Gulf Co., 363 U.S 547 (1960) 7, 8

STATUTES

National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. § 151 (1952):

Section 7 (29 U.S.C. § 157 (1952)) 9, 19

Section 9(a) (29 U.S.C. § 159(a) (1952)) 6, 9, 19

Section 10(a) (29 U.S.C. § 160(a) (1952)) 19

Labor Management Relations Act, 1947, 61 Stat. 136 (1947), 29 U.S.C. § 141 (1952):

Section 8(d) (29 U.S.C. § 158(d) (1952)) 3, 19

Section 301(a) (29 U.S.C. § 185(a) (1952)) 2

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 827

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17,

Petitioner,

v.

OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY,

Respondents.

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Tr. 78-88) is reported at 286 F.2d 4. The opinion of the District Court (Tr. 46-67) is reported at 188 F. Supp. 859.

JURISDICTION

As will be stated more fully below, petitioner either misconceives or misstates both the essential character of this case and the decision rendered by the court below. So also petitioner errs in its assertion that the decision of the Court of Appeals is in conflict with principles recently announced by this Court and with decisions of the Third, Fourth, Fifth and Tenth Circuits.

Consequently, as will be shown, petitioner's invocation of jurisdiction under 28 U.S.C. § 1254 (1) (1952) is not warranted in this case.

QUESTION PRESENTED

This case involves only a dispute concerning petitioner's continuing status as the exclusive bargaining representative of the pressroom employees of respondents. Petitioner seeks to compel the arbitration of this dispute. Consequently, contrary to petitioner's statement, the sole issue involved in this case is whether a federal court acting under Section 301(a) of the Labor-Management Relations Act (29 U.S.C. § 185(a) (1952)) may compel the arbitration of a dispute as to whether a union represents a majority of the employees in a given unit, in this case, the pressroom.

STATUTES INVOLVED

Those pertinent portions of the National Labor Relations Act (49 Stat. 449 (1935), as amended. 29 U.S.C. § 151 (1952)) and the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U.S.C. § 141 (1952)), which are not set forth in petitioner's brief (Pet. Br. 2-3) are contained in Appendix "A" to this brief.

STATEMENT OF THE CASE

The pertinent facts alleged in the complaint are:

1. On September 28, 1959, petitioner reopened the agreement between itself and the respondents (Tr. 5),

and a month later respondents submitted their counter-proposals (Tr. 6):

2. Commencing November 10, 1959, petitioner's members unanimously refused to work for respondents, which refusal continued until January 2, 1960, when petitioner declared itself on strike against respondents (Tr. 7, 10), and still continued when this action was filed on January 15, 1960 (Tr. 83).

3. On December 27, 1959, petitioner demanded that respondents meet and bargain over the terms of a new agreement to replace the one expiring by its terms on December 31, 1959 (Tr. 36-37):

4. On December 28, 1959, respondents rejected this demand, stating in explanation that petitioner's members were no longer employees, but expressing the willingness of respondents to meet with petitioner at any time petitioner could demonstrate that it represented a majority in an appropriate unit (Tr. 38-39):

5. Later the same day petitioner characterized this refusal as a "grievance" and attempted to submit it to the procedures provided by the contract (Tr. 40-41):

6. On January 2, 1960, petitioner declared itself on strike "in protest against the refusal of (respondents) to bargain collectively with (it) as the exclusive representative of the pressroom employees" (Tr. 10).

The allegations of plaintiff's complaint itself show that because of the failure of petitioner and its members to comply with the requirements of § 8(d) of the Labor Management Relations Act (29 U.S.C. § 158(d) (1952))

they were no longer "employees" for purposes of determining petitioner's right to continued recognition as the exclusive bargaining agent of the pressroom employees. However, the merits of respondents' position in this regard are not, of course, in issue here. The important point to be noted is that the alleged dispute over the discharge of employees which petitioner seeks to invoke is a phantom issue. The occasion for any such dispute never arose since petitioner's members, without exception, had continuously refused to report for work during the period in question here. The only dispute which ever did arise involved the technical status of these individuals only incidentally and for the sole purpose of determining whether petitioner represented a majority in the appropriate unit.

Of course, the court below readily discerned that upon the record, the only right with which petitioner was concerned was its own right to act as the bargaining agent of the pressroom employees (Tr. 84, 87). As to petitioner's members, the court below held that any question as to their technical status related not to any substantive rights arising under the contract but to the right of petitioner to continued recognition as their exclusive bargaining representative (Tr. 83-84, 87). The court below held that the determination of this question cannot depend upon private contract, but resides instead within the exclusive jurisdiction of the National Labor Relations Board (Tr. 84-85, 88). It is this decision which petitioner asks this Court to review.

ARGUMENT

Illustrative of petitioner's apparent failure to grasp the fundamental nature of this case are two questions which petitioner asserts are presented here. In summary, petitioner first poses the question of whether a court may refuse to compel the arbitration of a grievance arising under the contract because the court finds that an arbitrator could afford no "specific relief of a substantial character" (Pet. Br. 2). The second question posed by petitioner is whether the availability of a remedy under the National Labor Relations Act for conduct which constitutes a breach of contract deprives the courts of jurisdiction over that same conduct (Pet. Br. 2). Neither of these questions is presented either by the record or by the decision of the court below.

It seems apparent that both of petitioner's questions can only result from a misunderstanding of the essential character of this case as well as a misapprehension of the decision below. For neither question is relevant in the absence of that which is manifestly lacking here: a claim which on its face the parties have agreed to arbitrate, i.e. here, in the words of petitioner's two questions, a "grievance involving the construction or violation of the collective bargaining agreement," or "conduct which constitutes a breach of contract" (Pet. Br. 2).

The complete absence here of any dispute arising under the contract is illustrated by summarizing the sequence of events presented by the record: (1) a demand for bargaining by petitioner; (2) a refusal by re-

spondents to recognize and bargain with petitioner accompanied by a statement as to the employee status of petitioner's members who had chosen not to report for work since November 10, 1959 (Tr. 38, 7); (3) a strike initiated, in the words of the complaint, "in protest against the refusal of the (respondents) . . . to bargain collectively with (petitioner) as exclusive representative of the pressroom employees . . ." (Tr. 10); (4) a formal demand by petitioner and refusal by respondents to arbitrate this matter (Tr. 38-39, 44).

As held by the court below, it is this refusal of respondents to continue the recognition of petitioner as exclusive representative of the pressroom employees which constitutes the fundamental dispute between the parties here. As held by the court below, the matter of petitioner's representative status nowhere appears upon the face of the contract, and, indeed, the parties could not by private contract have undertaken to resolve questions of representation which Congress has chosen to repose with the National Labor Relations Board (29 U.S.C. § 159 (1952)) (Tr. 85).

Thus, it seems apparent that petitioner has somehow overlooked or forgotten the fact that this dispute involves only the question of its continuing representative status, a question which relates to possible statutory rights and procedural remedies, not to the construction or violation of the contract. Consequently, the subject matter of this dispute patently is not such as involves a grievance arising upon the face of the contract, and for that reason, is not a dispute such as the parties

have agreed to submit to the grievance procedure and to arbitration.

It is in this context that the court below held that the status of petitioner's members during the period in question is "of no substantial importance under the contract" (Tr. 83), and that the only conceivable right, if any, denied petitioner's members is a wholly statutory right, "the right to have their union bargain collectively for them" (Tr. 87). Of course, as pointed out by the court below, the procedures available for the enforcement of any such right are likewise statutory and not contractual in nature (Tr. 87). Therefore, it is evident on the record that the dispute over petitioner's representative status involved here does not raise questions which relate to the function of arbitrators in the declaration of contractual rights and the formulation of contractual remedies or to the jurisdiction of the courts to enforce the arbitration of such contractual matters.

Petitioner advances two principal arguments in support of its contention that a writ of certiorari should be granted in this case. As is the case of the two questions framed by petitioner, both arguments rest upon the assumption that this case involves a dispute which on its face arises under the contract. This assumption simply is not supported on the record.

Petitioner's first argument advances the proposition that the court below failed to follow the principles laid down by this Court in *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564; *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 547; and *United Steel-*

workers v. *Enterprise Corp.*, 363 U.S. 593 (1960), it having been held there that a court may not look to the merits of a dispute that is properly for the arbitrator, and may not refuse to order arbitration because it considers "the *grievance in dispute* as a 'frivolous, patently baseless one'" (363 U.S. a tp. 566) (Emphasis supplied) (Pet. Br. 10). Certainly this doctrine is beyond dispute.

However, petitioner apparently either overlooks or assumes that which this Court has held to be the fundamental prerequisite to the application of this principle, the existence of a "claim which on its face is governed by the contract" (363 U.S. at p. 568). As was stated by Mr. Justice Brennan, with whom Mr. Justice Harlan joined, concurring in the *American Mfg. Co.* and *Warrior & Gulf Navigation Co.* cases:

> "To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court."

Of course, unless there appears upon the face of the contract an obligation to arbitrate the particular matter involved here, the many arbitration decisions cited and discussed by petitioner have no relevance.

The fundamental question then is simply one of whether that which petitioner characterizes as "the grievance in dispute" (Pet. Br. 10) is in fact a dispute which "on its face is governed by the contract" (363

U.S. at p. 568). In this respect, respondents are in full agreement with the statement of petitioner: "If the grievance is one that the parties have agreed to arbitrate, the courts must order arbitration" (Pet. Br. 11). What then is the petitioner's "grievance," and have the parties agreed to arbitrate it, i.e., on its face is the matter governed by the contract? The record readily supplies the answer to the first inquiry: Petitioner's "grievance" is the refusal of respondents to meet and bargain with petitioner as the exclusive representative of those working in the pressroom (Tr. 36-37, 38-39, 10).

The answer to the second inquiry is self-evident: An agreement to arbitrate the subject matter of this "grievance," petitioner's right to continuing recognition as the exclusive representative of respondents' pressroom employees, nowhere appears upon the face of the agreement; petitioner nowhere alleges that it so appears; and, indeed, any such contractual guarantee of continuing recognition independent of petitioner's majority status would clearly violate both the rights guaranteed to employees under the National Labor Relations Act (29 U.S.C. § 157 (1952)) and the procedures which Congress has established for the enforcement of such rights (29 U.S.C. § 159 (1952)). As was said by the court below:

> "Whether the Pressmen represented the employees of the Publishers and whether the Pressmen was the proper bargaining agent for the Publishers to deal with in negotiating a new contract, are questions that the N.L.R.B. can properly determine. In fact, *the parties could not by private agreement take away from the Board the right to make*

those determinations." (Emphasis supplied) (Tr. 84-85).

It was solely in the context of this dispute over petitioner's continuing majority status and in the context of the unanimous and continuing refusal of petitioner's members to report for work that the court below considered the possibility that petitioner's claim involved upon its face any conceivable rights or potential remedies under the contract as to the individual pressmen. In so doing, the court below found that the status of petitioner's members was in dispute only insofar as that status affected the rights of petitioner "to bargain collectively with the publishers as exclusive representative of the pressroom employees of the publishers" (Tr. 84). In fact, as found by the court below, petitioner neither alleges rights which vested in its individual members under the contract (Tr. 87), nor asserts that such members had been injured in any way during the life of the contract (Tr. 83). Of course, under these circumstances it was inevitable that the court below would perceive no rights or remedies as to petitioner's members under the contract, for petitioner's claim on its face presented no such issue. As stated by the court below:

> "There is no claim that during the life of the contract anything occurred which entitled any of the individual members of Pressmen to compensation. They suffered no grievance during the life of the contract that is compensable in any way. Not a single member was willing to or did report for work from the tenth of November, 1959, until after the filing of this action on January 15, 1960. There is no dispute upon this point, for it is readily admitted by the Pressmen. No arbitrator

could award back pay to men who were at all times unwilling to work and who actually did not work.

> "The sole issue that was in dispute between the Pressmen and the Publishers was the technical question of whether the union members who had not worked since November 10th, who had willfully refused to work since that time, who did not intend to work, and who claimed they were not on strike should or should not be technically called employees between December 28 and December 31, 1959." (Tr. 83).

If the status of petitioner's members during the period in question has any relevance whatever it is to a matter entirely outside the scope of the contract, the representative status of petitioner itself. The decision below makes this point quite clear:

> "By the letter of December 27, 1959, the Pressmen state that the only matter with which they are concerned is the right to act as the bargaining agent of the plant workers. The Pressmen raised the question of the status of the employees only after they had received the Publishers' answer. The right that they are seeking to assert is not the right of the individual workers to return to work or to be awarded back pay. They are seeking the right to bargain collectively with the publishers as exclusive representative of the pressroom employees of the publishers." (Tr. 84).

In this regard, petitioner indulges itself in an obvious misconception by attempting to treat as a "grievance which the parties (have) contracted to refer to arbitration" (Pet. Br. 11), a dispute that does not appear, and could not properly have appeared, upon the face of the contract, namely, petitioner's right, if

any, to recognition as the exclusive bargaining representative of respondents' pressroom employees. The court rejected this contention, finding that on its face the claim presented here bears no relation whatever to the contractual obligation to arbitrate. Far from being in conflict with the decisions of this court in *American, Warrior,* and *Enterprise*, such a result is required by the principles there announced.

Petitioner's second argument rests upon the assertion that the decision of the court below is in conflict with decisions of the Third, Fourth, Fifth, and Tenth Circuits in holding, as petitioner puts it, that "the federal courts do not have jurisdiction because the conduct alleged as a breach of contract also constitutes an unfair labor practice within the jurisdiction of the National Labor Relations Board" (Pet. Br. 15). Of course, there would indeed be a split among the Circuits if this were in fact the holding of the court below. However, even a casual reading of that portion of the court's opinion which petitioner cites in support of this assertion readily reveals that such is not the case. Again, petitioner apparently misunderstands the decision below.

In the first place, the essential element involved in each of the four circuit court decisions cited by petitioner (*Lodge No. 12, Machinists* v. *Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir. 1958); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401 (3rd Cir. 1956); *Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951); and *United Steelworkers* v. *New Park Mining Co.*, 273 F.2d 352 (10th

Cir. 1959)), is something which obviously is not present here, conduct which on its face involved the contractual rights of the parties. It was this basic element over which the court in each case quite properly exercised jurisdiction. For instance, as stated in that portion of the court's opinion in *Cameron Iron Works*, which petitioner quotes at such length, it is stated:

> " . . . However, the appellee overlooks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*. If an arbitrable contract violation encompasses an unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the pre-emptive area. Likewise, the better-reasoned cases hold that even where the aggrieved incident or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the federal district courts will not be deprived of jurisdiction to grant relief as to the breach of contract, the other aspect being left to the Board." (Emphasis the court's.) (257 F.2d at 472.)

As the court in *Cameron Iron Works* also pointed out in the converse situation to that which is presented here,

> " . . . The distinguishing point is that, while an act may be both an arbitrable contract violation *and* an unfair labor practice, a 'breach of contract *is not* an unfair labor practice'; the former is enforced by the courts, the latter by the Board; the former gives to private parties a remedy, the latter uses a private right to effectuate the declared policies of the Act; the former gives a certainty of decision, the latter leaves decision discretionary." (Emphasis the court's.) (257 F.2d at 473.)

(To the same effect are *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401 (3rd Cir. 1956); *United Steelworkers* v. *New Park Mining Co.*, 273 F.2d 352 (10th Cir. 1959); and *Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951).)

This vital distinction "between contract provisions and matters committed exclusively to the Board" is one which petitioner evidently is unable to recognize. Instead, petitioner insists upon assuming that the latter, respondents' refusal to bargain, necessarily involves the former, a matter arising under the contract. Of course, it is this element of rights arising under the contract which is patently lacking in this case. As found by the court below, the record in this case readily reveals that the only conceivable right which petitioner and its members seek to protect here is not contractual, but statutory in nature, the right to represent and be represented for purposes of collective bargaining (Tr. 87). No such right appears, or properly could appear, upon the face of the contract (Tr. 84, 88), and questions concerning it necessarily bear absolutely no relation to the interpretation to be placed upon the contract (Tr. 86).

Most assuredly, as held by the court below and by those decisions cited by petitioner, an unfair labor practice may also constitute a breach of contract (Tr. 86). The decision of the court below is in complete accord with this doctrine. In fact, one of the cases (*Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529 (4th Cir., 1951)), cited with approval by the court below as illustrative of this well-established principle, is now pre-

sented by petitioner as evidence of the conflict among the circuits which petitioner claims to exist (Pet. Br. 17). We quote from the decision of the court below:

> "In *Textile Workers' Union* v. *Arista Mills Co.*, 193 F. 2d 529 (4 Cir. 1951), the same court of appeals affirmed the doctrine stated in *Amazon Cotton*, and quoted with approval the following statement made by Chief Judge Jones in *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949):
>
> > "'It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. Whether acts which constitute unfair labor practices under the statute have been committed by an employer and, if so, what remedies will be prescribed for the employees are matters within the exclusive jurisdiction of the Board. . . . *If, however, a particular act is the subject of an agreement between employer and union and the union sues for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only a breach of contract but also an unfair labor practice.*' (Emphasis supplied.)
>
> "The facts of the *Reed* case clearly involved the meaning of language that had been used in a contract between the employer and the union and involved substantial rights of the parties. In the case presently under consideration, we have pointed out that no substantial rights of the employees under the contract were involved, and no question is raised concerning the interpretation to be placed on the contract between the parties which expired on December 31, 1959.
>
> * * * *
>
> "We believe that where the question between the parties is whether one or the other has been

> guilty of an unfair labor practice and there are no substantial contract violations involved (and we have found none here) that the exclusive jurisdiction for the settlement of such a dispute should rest with the N.L.R.B." (Tr. 86-87.)

Certainly, the foregoing can leave no doubt either as to the position of the court below or as to its full agreement with the decisions of the Third, Fourth, Fifth and Tenth Circuits on this particular point. Petitioner's assertions to the contrary are clearly not well founded.

The peculiar facts of this case neither involve legal questions about which there is any real doubt nor present issues of "substantial public importance" (Pet. Br. 18). To be sure, the publishers' December 28, 1959, refusal to bargain with petitioner is of substantial importance to petitioner, as indeed it is to the respondents. However, contrary to petitioner's apparent assumption, this fact neither raises a breach of contract nor presents a grievance which on its face the parties have agreed to arbitrate. On the contrary, the situation here presents statutory procedures and potential statutory remedies with which petitioner is no doubt thoroughly familiar.

This case presents no question of screening grievances for merit or for substantial remedy (Pet. Br. 18). Nor does this case involve the abdication of jurisdiction over contract violations which may also present issues cognizable by the National Labor Relations Board (Pet. Br. 18). Instead, as is apparent, this case presents a dispute over a refusal to bargain. The question of whether it was a proper refusal under the circumstances is not here involved. What is involved is the obvious fact

that the refusal to bargain does not present a grievance which on its face is governed by the contract between the parties and which the parties have agreed to arbitrate. The courts below so held.

CONCLUSION

For the reasons stated above, respondents respectfully submit that this Court should decline to issue its writ of certiorari to review the decision below.

Respectfully submitted.

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APPENDIX A

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, * * *."

(49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952))

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"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

(49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1952))

- - - - - - -

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *."

(49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1952))

- - - - - - -

"Sec. 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *. Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce,

the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * *

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * * Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

(61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1952))

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 827

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17,
Petitioner,

v.

OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY, *Respondents.*

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The insistence throughout the Brief in Opposition (pp. 2, 4, 6, 9, 10, 11-12, 14) that this case "involves only a dispute concerning petitioner's continuing status as the exclusive bargaining representative of the pressroom employees of respondents" (Br. in Opp. p. 2), is contrary to the view of both of the courts below and to the undisputed record.

The court below stated (Pet., p. 28b):

> "The sole issue that was in dispute between the Pressman and the Publishers was the technical question of whether the union members who had not worked since November 10th, who had willfully refused to work since that time, who did not intend to work, and who claimed they were not on

strike should or should not be technically called employees between December 28 and December 31, 1959."

The district court likewise described the "grievance of plaintiff concerning the employer's position that the employee status of Plaintiff's members was terminated" as the "only" dispute involved in this case (Tr. 65). The district court further stated that this was the grievance asserted by the Pressmen in the letter of December 28, 1959 (Tr. 65).

There is nothing in the record to warrant any conclusion that the Pressmen's grievance was directed either primarily or in any part at securing an arbitration award requiring the Publishers to bargain with the Pressmen. While it could be that relief the arbitrator might award would involve, either directly or indirectly, as a part of the remedy, an order to the Publishers to deal with the Pressmen, the possibility of such an award does not strip the grievance of its basic issues and make a demand for bargaining the grievance itself. Rather, the Pressmen's grievance arose solely out of the Publishers' letter of December 28, 1959 (Tr. 38) in which the Publishers took the position that the Pressmen had violated the no-strike clause of the then existing collective bargaining agreement and that its members were no longer employees. The Pressmen desired to have an arbitrator pass on the issues of whether the Pressmen had violated the no-strike clause and whether its members had been properly discharged for honoring the Stereotypers' picket line (Tr. 40).

If the Pressmen had not at once invoked arbitration of these issues, its failure might have had many repercussions unconnected with resumption of bargaining

relations between the Pressmen and the Publishers. The Publishers may still sue the Pressmen in court for damages for violation of the no-strike clause. In at least one such court suit, unions in their efforts to stay judicial proceedings pending arbitration, have faced the contention that they waived arbitration by failing to invoke it.[1] Similarly, the duty of the Pressmen to invoke arbitration to protect the job rights of its members exists wholly apart from the Pressmen's status as bargaining representative.

To assert, as respondents do (Br. in Opp., pp. 3, 6, 14) that the grievance which Pressmen attempted to submit to arbitration was the refusal to bargain, constitutes a complete distortion of the record. It is true that the complaint here sets forth the context of efforts to negotiate a new contract during the course of which the Pressmen discovered that the Publishers had decided to treat the Pressmen's members as no longer employed by the Publishers. The contract between Pressmen and the Publishers had been opened for renegotiation before the Stereotypers strike began (Tr. 6). One meeting to discuss the terms of a new contract between the Pressmen and the Publishers took place on November 18, 1959 (Tr. 7). At that time the Publishers met with the Pressmen and proceeded with the negotiation of a new contract (Tr. 7-8). When the Pressmen sent its letter of December 27, 1959, seeking further meetings to negotiate a new contract (Tr. 36-37), the Pressmen was unaware that the Publishers were contending that the Pressmen had violated the collective bargaining agreement or that its members

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[1] *Tenney Engineering, Inc.* v. *United Electrical Radio and Machine Workers of America* (D.C.N.J. 1959), 174 F. Supp. 878, appeal dismissed, 2 Cir., 1959, 267 F. 2d 618.

were no longer employees. Although the Stereotypers' strike had begun on November 10, 1959, and the members of the Pressmen acting individually had, from that date on, continuously refused to cross the Stereotypers' picket line, the Publishers had met with the Pressmen on November 18, 1959 and proceeded with the negotiation of a new contract between the Publishers and the Pressmen without raising any contention that the Pressmen's members had ceased to be employees, or were in serious or any violation of the contract.

With this background, the Publishers' letter of December 28, 1959 (Tr. 38-39), came as a complete surprise. It injected into the relationships between the parties new issues—had the Pressmen by its conduct violated the no-strike clause and had the members of the Pressmen by their conduct forfeited employee status. It was these issues which the Pressmen by its letter of December 28, 1959 (Tr. 40-41) referred to arbitration.

After having referred these issues to arbitration, where they clearly belonged, the Pressmen quite properly omitted any reference to these issues when on January 2, 1960, the first business day after its old contract expired, it called a strike against the Publishers to secure a new contract (Tr. 10). While respondents (Br. in Opp., pp. 5-6) contend that the failure to mention the reinstatement of its members in its strike call showed that the Pressmen's real objective in the arbitration was to get its bargaining rights restored rather than to restore the jobs of its members, we submit the respondents both improperly read the record and improperly make the nature of the grievance turn on some supposed motive of the Pressmen rather than on the language of the grievance submitted.

The omission of the issues separated out for arbitration from the objectives of the strike established just the opposite of what the respondents argue. The grievance was directed at clearing up the issue of whether the Pressmen had been guilty of a contract violation and whether its members had been properly discharged. The strike was about something different—whether the Publishers should bargain with the Pressment and the terms of the new contract. The Union could not consistently insist on arbitrating issues and at the same time strike over those same issues. The stated objectives of the strike show the arbitration case was about issues other than and sharply different from, the right to bargain and get a new contract.

The fact that the Pressmen will in all probability get its bargaining rights restored if it is successful in securing reinstatement of its members, cannot make the grievance about the employment rights of its members anything other than a legitimate breach of contract grievance.

We accordingly respectfully submit that the decision below does present the questions stated in our petition for a writ of certiorari (p. 2) and that this Court should grant the writ.

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